

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICIA FORTLAGE,

No C 08-3406 VRW

Plaintiff,

v

HELLER EHRMAN, LLP; HELLER EHRMAN
LONG-TERM DISABILITY PLAN and
UNITED MUTUAL LIFE INSURANCE CO
OF AMERICA,

Defendant.

In the above-captioned ERISA action case for long-term disability benefits, plaintiff Patricia Fortlage raises several objections to the magistrate's report and recommendation of proposed findings of fact and conclusions of law addressing the parties' cross-motions for judgment. Doc ##77, 81. For the reasons that follow, the court SUSTAINS IN PART plaintiff's objections, DECLINES TO RULE on the remainder of plaintiff's objections and REMANDS the claim to United Mutual Life Insurance Company ["UNUM"], real party in interest, for further consideration.

I

Plaintiff contends that she is disabled as a result of various medical impairments, including ocular myasthenia gravis or a left cranial nerve palsy (a visual impairment), neurocardiogenic syncope (a heart condition) and Sjogren's disease (an autoimmune disorder). Plaintiff alleges that defendant, the Heller Ehrman Long-Term Disability Plan, and the administrator of the plan, UNUM, improperly denied the plaintiff disability benefits. This court referred the parties' cross-motions for judgment, Doc ##29 & 38, to a magistrate for proposed findings of fact and recommendations. Doc #72. Pursuant to the court's referral, the magistrate conducted a hearing on November 17, 2009, Doc #76, at which plaintiff clarified that she believed Sjogren's disease to be the unifying diagnosis for all of her symptoms, including her alleged visual and heart problems and fatigue. After considering the arguments of the parties, and reviewing the parties' submissions and all other evidence of record, the magistrate submitted a report and recommendation that judgment be entered in favor of defendant. Doc #77.

II

Pursuant to 28 USC § 636(b)(1)(B), a district judge may designate a magistrate judge to hear and file a recommendation for disposition of matters dispositive of a party's claims or defenses, and a party objecting to the recommendation may file a timely objection. See Estate of Conners by Meredith v O'Connor, 6 F3d 656, 658 (9th Cir 1993). After receiving the magistrate's report

1 and recommendation the district judge must make a "de novo
2 determination of those portions of the report or specified proposed
3 findings or recommendations to which objection is made" and "may
4 accept, reject, or modify, in whole or in part, the findings or
5 recommendations made by the magistrate judge." 28 USC
6 § 636(b)(1)(C).

8 9 III

10 Plaintiff makes several objections to Magistrate Judge
11 Chen's report and recommendation. Doc #81. The court first
12 considers plaintiff's objection to the magistrate's recommendation
13 not to remand the matter to UNUM for further consideration.

14 In his report and recommendation, the magistrate found
15 that UNUM violated ERISA procedures when it failed to submit a 2008
16 report by Dr Carteron to UNUM's medical department for review. Doc
17 #77 at 47. The magistrate, however, did not find it necessary to
18 remand the matter back to UNUM for consideration of the report:

19 In the instant case, the Court concludes that a remand is not
20 necessary. At best, the June 2008 report of Dr. Carteron,
21 which found, inter alia, a multi-system inflammatory
22 autoimmune disorder responsible for the cardiogenic syncope,
23 might affect the conclusion that Ms. Fortlage's conditions
24 were pre-existing. Dr. Carteron's diagnosis, if correct, would
25 establish that Ms. Fortlage's conditions were attributable to
26 a new disease (i.e., an autoimmune disorder rather than pre-
27 existing anxiety causing her cardiogenic syncope) for which
28 she had not been treated during the look back period.

But, as noted above, Unum Life denied benefits also because it
found that Ms. Fortlage's symptoms did not prevent her from
working with reasonable restrictions and limitations. While
Ms. Fortlage focuses on the new diagnosis of Sjogren's as a
cause of her symptoms, she fails to show how this diagnosis
would alter Unum Life's conclusion that those impairments were
not disabling. The same exact symptoms and the correlative
restrictions and limitations allowing her to work would obtain

1 even if the new diagnosis were accepted. In short, the new
2 diagnosis is immaterial to the independent basis of Unum
3 Life's denial - that Ms. Fortlage was not disabled under the
4 policy. Hence, remand would serve no purpose, and the Court
shall decide for itself whether the denial of benefits was
proper itself based on all the evidence of record, including
the new evidence.

5 Id at 49-50.

6 The magistrate correctly noted that, under Ninth Circuit
7 ERISA law, "the usual remedy for a violation of [section] 1133 is
8 to remand to the plan administrator so the claimant gets the
9 benefit of a full and fair review." Chuck v Hewlett Packard Co,
10 455 F3d 1026, 1035 (9th Cir 2006) (internal quotation omitted); see
11 also Lafleur v La Health Serv & Indem Co, 563 F3d 148, 157-58 (5th
12 Cir 2009); Shelby County Health Care Corp v Majestic Star Casino,
13 LLC Group Health Ben Plan, 581 F3d 355, 373 (6th Cir 2009); Krauss
14 v Oxford Health Plans, Inc, 517 F3d 614, 630 (2d Cir 2008);
15 Gagliano v Reliance Std Life Ins Co, 547 F3d 230, 240 (4th Cir
16 2008); Caldwell v Life Ins Co of N Am, 287 F3d 1276, 1288 (10th Cir
17 2002). The "usual remedy" of remanding the action for further
18 consideration of the plan administrator, established by Chuck, was
19 undisturbed by the decision in Abatie one month later, which held:
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21 When a plan administrator has failed to follow a procedural
22 requirement of ERISA, the court may have to consider evidence
outside the administrative record. For example, if the
23 administrator did not provide a full and fair hearing, as
required by ERISA, 29 U.S.C. § 1133(2), the court must be in a
24 position to assess the effect of that failure and, before it
can do so, must permit the participant to present additional
evidence. We follow the Sixth Circuit in holding that, when an
25 administrator has engaged in a procedural irregularity that
has affected the administrative review, the district court
26 should "reconsider [the denial of benefits] after [the plan
participant] has been given the opportunity to submit
27 additional evidence." VanderKlok v. Provident Life & Accident
Ins. Co., 956 F.2d 610, 617 (6th Cir. 1992).

28 As we noted earlier, if the plan administrator's procedural

1 defalcations are flagrant, de novo review applies. And as we
2 also noted, when de novo review applies, the court is not
limited to the administrative record and may take additional
evidence.

3 Even when procedural irregularities are smaller, though, and
4 abuse of discretion review applies, the court may take
5 additional evidence when the irregularities have prevented
6 full development of the administrative record. In that way the
court may, in essence, recreate what the administrative record
would have been had the procedure been correct.

7 Abatie v Alta Health & Life Ins Co, 458 F3d 955, 973 (9th Cir 2006)
8 (finding that the district court erred by not considering new
9 evidence submitted by plaintiff). Similarly, the Ninth Circuit has
10 found error where the district court did not give the plaintiff a
11 "fair chance to present evidence on [a] point." Saffon v Wells
12 Fargo & Co Long Term Disability Plan, 522 F3d 863, 871 (9th Cir
13 2008).

14 For the reasons stated in the magistrate's order, Doc
15 #77, UNUM's decision not to submit Dr Carteron's report to its
16 medical department for review was a clear procedural violation.
17 This procedural violation provided the magistrate with the option
18 to consider evidence outside of the administrative record, or to
19 remand to UNUM for further consideration.

20 While the magistrate, after considering the effect of the
21 Carteron report on plaintiff's claim, found that remand was
22 unnecessary, Doc #77 at 49, the court sees no reason to depart from
23 the Ninth Circuit's preferred "usual remedy" in this case. See
24 Chuck, 455 F3d at 1035. Such a departure might be appropriate in
25 several situations, including one in which the new evidence
26 unequivocally supports the court's ultimate decision. That is to
27 say, where a party succeeds on the administrative record, it would
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1 be a waste of time and resources to remand the case for further
2 consideration of that party's new, favorable medical evidence.
3 That is not the case here, where the magistrate recommends for the
4 court to consider (allegedly) plaintiff-friendly evidence but
5 nonetheless to grant defendant's motion for judgment. The court,
6 therefore, following the Ninth Circuit's preferred "usual remedy,"
7 Chuck, 455 F3d at 1035, SUSTAINS plaintiff's objection and REMANDS
8 the action to UNUM for further consideration.

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10 IV

11 Because the court sustains plaintiff's objection and
12 REMANDS to UNUM for consideration of the Carteron report, it
13 DECLINES TO RULE on plaintiff's remaining objections.
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16 V

17 As the Supreme Court recently reiterated, "ERISA law [is]
18 already complicated enough without adding special procedural or
19 evidentiary rules to the mix." Conkright v Frommert, ___ US ___, 5
20 (2010) (slip op) (citation and internal quotation omitted). When,
21 a plan administrator (or here, a plan's clerical staff) makes a
22 simple mistake, the plan remains entitled to deference. *Id* at 5-6.
23 This court, however, would face a difficult challenge evaluating
24 plaintiff's claims through such a deferential lense, while, at the
25 same time, independently scrutinizing the Carteron report. It is
26 thus appropriate, rather than to substitute its judgment for that
27 of the plan administrator or, perhaps more accurately, to adopt the
28 plan's post hoc rationales for why the Carteron report is of no

1 value, for the court to follow the Ninth Circuit's preferred "usual
2 remedy" in such circumstances and to remand the file for further
3 consideration for a full and fair review.

4 Accordingly, the court SUSTAINS plaintiff's objections IN
5 PART, DECLINES TO RULE on the remainder of plaintiff's objections
6 and REMANDS the case to UNUM for full and fair review of the
7 administrative record supplemented by the Carteron report. The
8 clerk is directed to close the file administratively.

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10 IT IS SO ORDERED

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13 VAUGHN R WALKER
14 United States District Chief Judge
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